

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Personal Attack Complaint Filed By)
Orrin R. Ford Against AM radio Station)
WERC, Birmingham, Alabama)

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 2003

Released: November 12, 2003

By the Commission:

1. The Commission has before it an Application for Review filed by Orrin R. Ford ("Ford") concerning alleged violations of the personal attack rule, former Section 73.1920 of the Commission's Rules, 47 C.F.R. § 73.1920, and an opposition thereto filed by the licensee of WERC. Ford asks the Commission to vacate the decision of the Chief of the former Mass Media Bureau, dismissing all allegations in his complaint against AM radio Station WERC, Birmingham, Alabama, concerning the personal attack rule and referring his other allegations to the Enforcement Bureau for further consideration.¹ In the alternative, Ford asks the Commission to correct the basis for dismissal of his complaint.

2. In *WERC*, the Mass Media Bureau dismissed as moot all aspects of Ford's complaint that concerned allegations of violations of the personal attack rule. The Mass Media Bureau based its decision on the Commission's repeal of the personal attack rule² pursuant to a *writ of mandamus* issued by the U.S. Court of Appeals for the District of Columbia Circuit.³ The court's issuing of the *writ* was the final judicial decision in a proceeding that had been initiated by a petition for rulemaking filed by the National Association of Broadcasters requesting that the Commission repeal the personal attack and political editorial rules. In an earlier decision, the court had acknowledged that the personal attack and political editorial rules "interfere with at least some journalistic judgment, chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment."⁴ The court remanded "the case to afford the FCC an opportunity to provide adequate justification for retaining the personal attack and

¹ Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Orrin R. Ford, Esquire (June 14, 2001) ("*WERC*"). In his Application for Review, Ford also requests that the Commission withdraw the referral of his claims of misrepresentation against the station to the Enforcement Bureau; that the Commission take jurisdiction of the complaint, including his misrepresentation claims; that the Commission hold hearings, both evidentiary and legal, on the merits of the complaint and subsequent proceedings concerning the complaint and supplemental matters; and that the Commission enter an order adjudicating all matters contained in the complaint and supplementary proceedings regarding the complaint and granting the relief prayed for therein.

² *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 FCC Rcd 20697 (2000).

³ *Radio-Television News Directors Association v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) (*RTNDA*).

⁴ *Radio-Television News Directors Association v. FCC*, 184 F.3d 872, 887 (D.C. Cir. 1999).

political editorial rules.”⁵ In issuing the *writ* ordering the FCC to repeal the rules, the court indicated that the Commission had not provided adequate justification for retaining them.⁶

3. Ford argues that his allegations concerning the personal attack rule should not have been dismissed as moot because, at the time of the alleged violations, the personal attack rule was still in effect. We disagree. Although the personal attack rule was in effect at the time of Ford’s alleged violations, the Mass Media Bureau correctly chose not to exercise its discretion to enforce this rule under the circumstances in this case. The U.S. Court of Appeals for the District of Columbia Circuit indicated that it had concerns about the constitutionality of the personal attack rule. The Commission was unable to justify retention of the rule to the court’s satisfaction, resulting in the court’s directing the Commission to repeal the rule. Any attempt to enforce the personal attack rule under these circumstances would most likely result in substantial resources being expended litigating the constitutionality of a rule that no longer exists.⁷

4. Ford also contends that the Commission failed to address his allegations that the station violated provisions of the Communications Act. In his complaint, Ford argued that WERC’s “wilful conduct hereinabove described [alleged violations of the personal attack rule] constitutes a violation of Sec. 312 of the Communications Act of 1934, as amended, 47 USC 312, and more specifically subsections (a)(2), (a)(3), (a)(4) of said section.”⁸ In *WERC*, the Mass Media Bureau dismissed “as moot all aspects of [Ford’s] complaint that concern allegations of violations of the personal attack rule,” which would include the his claimed violations of the Communications Act.

5. Ford presents no new facts or arguments in his Application for Review that would persuade us to change the Bureau’s decision. We have reviewed the Bureau’s action and find that its ruling was correct. There is no reason to disturb it. *See WAMC, Inc.*, 10 FCC Rcd 12219 (1995) (denying application for review raising essentially same arguments as in the petition for reconsideration).

6. Accordingly, IT IS ORDERED that the Application for Review filed by Ford IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵ *Id.* at 889.

⁶ *RTNDA*, *supra* n.3.

⁷ In documents filed subsequent to his complaint, as well as in his Application for Review, Ford argued that a personal attack reply obligation is codified in the Communications Act. By ordering the Commission to repeal the personal attack rule, the court in *WERC* implicitly negated this argument.

⁸ These provisions concern reasons for the Commission to revoke a station license such as willful or repeated violation of any rule of the Commission authorized by the Communications Act.